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In the Supreme Court of the United States

OCTOBER TERM, 1926

No. 131

R. B. SMYER AND UNITED STATES FIDELITY AND GUARANTY COMPANY, Appellants

v.

THE UNITED STATES OF AMERICA

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The District Court filed no opinion. The opinion of the Circuit Court of Appeals (R. 85) is reported in 6 F. (2d) 12.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered May 8, 1925. (R. 86.) Petition for appeal was filed and allowed May 26, 1925. (R. 86, 87.)

The United States brought suit on the official bond of Rufus B. Smyer, as Postmaster at Birmingham, Ala., in the United States District Court, which rendered judgment for the United States, which on writ of error was affirmed by the Circuit Court of Appeals. The jurisdiction of this Court rests on Section 241 of the Judicial Code (since repealed by the Act of February 13, 1925).

The action being one at law, the case should have been brought to this Court by writ of error instead of by appeal, but the mistake is rendered immaterial by Section 4 of the Act of September 6, 1916, c. 488, 39 Stat. 726, 727.

THE QUESTION

The postmaster's bond was conditioned "that if the said Rufus B. Smyer shall faithfully discharge all duties and trusts imposed on him by law and by the regulations of the Post Office Department * * * then this obligation shall be void; otherwise, of force."

The question involved in the case is whether Smyer, as Postmaster, was under any duty, imposed by law or by regulation of the Post Office Department, to keep safely the money collected by Smith, superintendent of mails in his post office, upon the delivery of C. O. D. packages, and embezzled by Smith. The appellants concede that if the money embezzled by Smith was "money-order funds" within the meaning of Section 4045 of the Revised Statutes, it was also public money within

the meaning of Section 3846 of the Revised Statutes, that under Section 3846 Smyer was under a duty to keep all public money safely, and that if the money in question was "money-order funds" under Section 4045, or otherwise public money, the appellants are liable on his official bond for the loss caused by his failure to keep it safely. The sole question, therefore, is whether the money embezzled by Smith was "money-order funds" within the meaning of Section 4045, or otherwise public money. The contention of the appellants is that because money orders were not actually issued for the money received by Smith, and Smith was connected with the Department of Mails and not the Department of Finance and had no authority to issue money orders, money in his hands was not "money-order funds" or otherwise public money, but was merely held by him as the agent of the addressees of the C. O. D. packages for the purchase of money orders.

STATUTES INVOLVED

Section 4045 of the Revised Statutes is as follows:

> All money received for the sale of money orders, including all fees thereon, all money transferred from the postal revenues to the money-order funds, all money transferred or paid from the money-order funds to the service of the Post Office Department, and all money-order funds transferred from one postmaster to another, shall be deemed and

taken to be money-order funds and money in the Treasury of the United States. And it shall be the duty of the assistant treasurer of the United States to open, at the request of the Postmaster General, an account of "money order funds" deposited by postmasters to the credit of the Postmaster General, and of drafts against the amount so deposited, drawn by him and countersigned by the Sixth Auditor.

Section 3846 of the Revised Statutes is as follows:

> Postmasters shall keep safely, without loaning, using, depositing in an unauthorized bank, or exchanging for other funds, all the public money collected by them, or which may come into their possession, until it is ordered by the Postmaster General to be transferred or paid out.

STATEMENT

This case involves the question whether the defendants are liable on Smyer's official bond as Postmaster at Birmingham for moneys embezzled by one John A. Smith, without fault or negligence on the part of the Postmaster, such moneys having rightfully come into the custody of Smith, in his official capacity as Assistant Superintendent of Mails at the post office, as collections on various collect-on-delivery parcels, and it being Smith's duty to turn over such moneys to the money-order division of the post office, whereupon money orders would be issued and sent to the shippers of the parcels.

The original complaint contained five counts. (R. 6–20.) The defendants demurred to the complaint. (R. 21, 28.) The plaintiff then filed an amendment to the complaint, amending each of the original counts and adding a sixth count (R. 29), and the defendants demurred to the complaint as amended (R. 38, 39, 40, 41). The plaintiff withdrew count five and count two of the complaint and the trial court overruled the demurrers to the remaining counts. (R. 4, 42, 64–66.) Each of these counts alleged, in substance, that Smyer, as Postmaster, failed to keep safely and to account for $10,151.91 received for the sale of money orders during the period between July 1, 1921, and December 31, 1921. (R. 6–20, 29–37.) The parties waived a trial by jury (R. 43) and entered into a stipulation as to the facts in the case (R. 44–60). The court found the facts to be as stated in the stipulation of the parties. (R. 64.) The defendants' motion for judgment was overruled, and the court sustained the plaintiff's motion for judgment against the defendants for the sum of $9,488.54, being the sum of $9,257.11, with interest thereon from June 23, 1924, the date of the demand for payment of the principal sum. (R. 64–66.)

It appears from the stipulation of the parties that the appellant Rufus B. Smyer, was postmaster of the post office at Birmingham, Alabama, from January 6, 1916, to and including August 20, 1924. (R. 45.) The appellants executed an official bond dated February 10, 1920, in the sum of $100,000,

with the United States of America as obligee, and this bond was accepted by the Postmaster General on March 2, 1920, and was in full force and effect during all the period of time covered by the transactions involved in this litigation. (R. 45, 7–8.) The material condition of the bond was (R. 8):

> * * * that if the said Rufus B. Smyer shall faithfully discharge all duties and trusts imposed on him by law and by the regulations of the Post Office Department * * * then this obligation shall be void; otherwise, of force.

When Smyer was first appointed Postmaster, John A. Smith was an employee of the United States in the post office at Birmingham, Alabama, and held, and continued to hold, the position of foreman in the parcel-post section of that post office until May 16, 1921, when he was promoted to the position of Assistant Superintendent of Mails. While Smith was foreman, and while he was Assistant Superintendent of Mails, he handled and had charge of all parcel-post mail matter in the main post office at Birmingham. (R. 45–46.)

Smith held his position under the civil service law and rules and regulations of the United States, and the Postmaster had no authority to discharge or remove him from office or from his position except upon order of the Post Office Department. (R. 47.)

During the entire time that Smyer was Postmaster the Birmingham post office was a first-class

office and was operated under the two-division plan by order of the Post Office Department; that is, the post office was divided into what were known as the Finance Department and the Department of Mails. The parcel-post mail, including collect-on-delivery or C. O. D. parcel-post mail matter, was handled in the Department of Mails, and the money-order business was handled in the Department of Finance. (R. 47.)

It was part of Smith's duties to receive into his custody parcel post mail, including collect-on-delivery packages of parcel post mail, and to deliver such packages and cause them to be delivered, and to collect and cause to be collected from the addressees of all collect-on-delivery parcel post packages the amount of money set forth on the tags attached to such packages as being due to the senders of such packages, and also to collect from each addressee an amount sufficient to purchase a money order payable to the sender of the particular package. (R. 48.)

It was Smith's duty to turn over the money collected and the receipted tags to the Money Order Department of the post office, and there purchase and cause to be issued by that Department money orders payable to the senders of the packages, and to have these money orders issued not later than the day following the actual delivery of the packages and collection of the money. (R. 49.)

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The tags, when signed by the addressees of the packages, were considered by the Post Office Department as applications for money orders payable to the persons shown on the tags as the shippers of the packages. (R. 51.)

The various packages of collect-on-delivery parcel post mail described in the complaint were received at the Birmingham post office during the time Smith was Assistant Superintendent of Mails and were delivered from the main office of the Birmingham post office by Smith, and by carriers and employees, and all moneys collected thereon were either received directly by Smith or turned over to him by the delivering employees, who had actually delivered said packages to the addressees. Each of said addressees signed the receipted tag attached to the particular package at the time of receiving the same, and all such tags were received by or turned over to Smith together with the amount of money collected. (R. 48–49.)

In November, 1921, Smith became sick, or claimed he was sick, and was absent from the office, and Smyer, as Postmaster, directed that all of the mail which, in the ordinary course of business, would go to Smith, should be sent to Smyer's desk for consideration by him. In this mail Smyer found numerous letters of inquiry or complaint in regard to non-remittances on collect-on-delivery parcel-post packages. He investigated and could find no tags pertaining to or connected with the

numerous complaints, but in some instances found that money orders had been sent to complaining shippers. (R. 54–55.) An investigation by post-office inspectors followed (R. 55), and it appeared that Smith, in many instances, instead of delivering the tags and the money collected on collect-on-delivery parcel-post packages, appropriated the moneys to his own use and placed the receipted tags in his private locker, to which he was the only person having a key. The post office inspectors found 1,560 such receipted tags in Smith's locker, representing collections of $9,901.96. (R. 51.)

The total amount so embezzled by Smith was $10,-151.91. Smith commenced his embezzlements some time prior to August, 1921, and carried them on by what is known as kiting; that is, when he embezzled the collections from a package he would preserve the tag in his private locker, and subsequently would use money collected from other packages to procure a money order to be sent to the shipper of the package, the collection on which he had previously embezzled; and in this way he was constantly increasing his shortage. (R. 52.)

Claims for indemnity were filed by many of the shippers of the packages, collections on which were embezzled by Smith, and the Post Office Department paid indemnity on such claims amounting to $9,173.45. There was due to the United States $83.66, which was collected by Smith as fees for

the money orders which should have been purchased by Smith. (R. 53.)

Although the total embezzlements by Smith amounted to $10,151.91 (R. 52), the judgment of the trial court was for only $9,257.11, representing the $9,173.45 paid by the Post Office Department as indemnity to shippers, and the $83.66 due the Government as money order fees, with interest (R. 65).

The Government does not claim that Smyer, the Postmaster, was guilty of any wrongdoing, or even of negligence.

SUMMARY OF ARGUMENT

I. That the money embezzled by Smith was "money received for the sale of money orders" within the meaning of Section 4045 of the Revised Statutes and, therefore, money which Smyer was obligated to keep safely and for the loss of which the defendants are liable on Smyer's official bond, is demonstrated—

(a) By the language of Section 4045.

(b) By the purpose of the section, which is clearly to extend to money received by the Post Office Department in connection with the money-order business the safeguards for public money provided in the statutes, since this purpose is equally applicable whether or not a money order is ever actually issued.

(c) By Sections 4029 and 4044 of the Revised Statutes, making postmasters, and their sureties, accountable upon their official bonds for all moneys received at branch post offices "by reason of the transaction * * * of money-order business," and requiring postmasters to render accounts of all moneys received "on account of money-order business," since it would be illogical to hold that Section 4045 is less extensive than these sections.

(d) By *Foster* v. *United States* (C. C. A., 5th Circuit), 256 Fed. 207, the only case in the Circuit Court of Appeals in which the question has been considered, although *United States* v. *Mann* (D. C., S. D. Georgia), 160 Fed. 552, apparently supports a contrary view.

II. Smith received the money in question as a public officer acting in the line of his duty, and the money belonged to the United States and was public money irrespective of whether it was "Money-Order Funds" under Section 4045 of the Revised Statutes.

Neither the facts in this case nor the authorities lend any support to the contention that Smith was the agent of the addressees of the C. O. D. packages for the purchase of money orders or was acting in any capacity other than as an authorized agent of the Post Office Department.

III. The fact that the Government indemnifies shippers against loss is immaterial, as it is in no way inconsistent with an intention to hold Postmasters and their sureties on their official bonds.

ARGUMENT

I

THE MONEY EMBEZZLED BY SMITH WAS "MONEY RECEIVED FOR THE SALE OF MONEY ORDERS" WITHIN THE MEANING OF SECTION 4045 OF THE REVISED STATUTES AND, THEREFORE, MONEY WHICH SMYER WAS OBLIGATED TO KEEP SAFELY AND FOR THE LOSS OF WHICH THE DEFENDANTS ARE LIABLE ON SMYER'S OFFICIAL BOND

(a) *The language of Section 4045*

The appellants contend that the words "for the sale of money orders" relate only to executed sales; that money is not received for the sale of a money order unless the money order is actually sold and issued. In their brief they state (page 20):

> The money embezzled was money *for the purchase not from the sale,* of money orders.

It is significant that, in order to point out the distinction contended for, the appellants felt it necessary to change the words "for the sale," used in the statute, to "from the sale." The inference is clear that the word "for" has not the restrictive meaning for which the appellants contend.

Moreover, the authorities support the view that money may be received "for" a certain object, regardless of whether the object is accomplished; indeed, while the word has, of course, a great variety of meanings, it is probable that in its ordinary use it is prospective rather than retrospective, indicating something to be accomplished in the future

rather than something accomplished in the past. The *Standard Dictionary* says of the word:

> A word of wide application indicating generally the reason for an action or the object sought.

The *Century Dictionary* gives among the various meanings of the word "in order to obtain" and "in consideration of." *Webster's New International Dictionary* says of the word "for":

> In the most general sense, indicating that in consideration of which, in view of which, or with reference to which, anything is, is done, or takes place.

We think it clear that, so far as the language itself indicates, "money received for the sale of money orders" means simply money received in consideration for the past, present, or future issue and sale of money orders.

(b) *The purpose of the section*

Section 4045 of the Revised Statutes was derived from Section 121 of the Act of June 8, 1872, c. 335, 17 Stat. 283, 299. Section 4027 of the Revised Statutes, which was derived from Section 102 of the Act of 1872, provides:

> To promote public convenience, and to insure greater security in the transfer of money through the mail, the Postmaster General may establish and maintain, under such rules and regulations as he may deem expedient, a uniform money-order system, at

all suitable post offices, which shall be designated as "money-order offices."

Money received for the sale of a money order differs from money received by the United States in payment of taxes or other obligations due the United States in that, although the actual money received is to be retained by the United States, an equivalent amount, less the fee for the service, is to be paid to the payee of the money order. In receiving the money the Government is not accepting satisfaction of an obligation due to it, but is assuming an obligation to make payment to a designated payee. Congress undoubtedly thought that under these circumstances some question might arise as to whether money received for the sale of a money order was public money and entitled to the safeguards for public money provided in the statutes. To avoid any question as to this, Section 121 of the Act of June 8, 1872, and Section 4045 of the Revised Statutes were adopted. It can hardly be seriously argued that Congress intended the protection thus provided to be contingent upon the proper issuance of a money order. What Congress had in mind was that, having authorized a money-order system, which would involve the receipt of large amounts of money by the Post Office Department in a quasi-banking capacity, it was necessary to make it clear that money so received was public funds and subject to all the safeguards provided for such funds. It can not have been the intention

of Congress that this protection shall not be applicable to money received by an authorized agent of a post office if he fails to issue a money order, or issues a defective money order, or otherwise fails to accomplish the purpose for which the money was paid to him. The application of the section must depend upon the purpose for which the money is received; not upon the accomplishment of that purpose.

The appellants seem to suggest that because Section 4045 of the Revised Statutes was originally enacted in 1872, and the parcel post law was enacted in 1912, Congress can not have intended to include in Section 4045 money collected on C. O. D. packages. The conclusion does not logically follow from the premise. In adopting the Act of June 8, 1872, and Section 4045 of the Revised Statutes, Congress did not attempt to fix definitely all of the details of the operation of the money-order system. Much was left to be determined by the rules and regulations of the Postmaster General, and further statutory authority or control from time to time was no doubt contemplated. Money properly received for the sale of money orders pursuant to the statutes and rules and regulations in force at the time of its receipt was to be public money, regardless of whether the particular statute or regulation under which the money was received was in force or contemplated at the time Section 4045 was adopted.

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(c) *Other statutory provisions support the construction of Section 4045 of the Revised Statutes here contended for*

Section 4029 of the Revised Statutes is as follows:

> The postmaster of every city where branch post offices or stations are established and in operation, subject to his supervision, is authorized, under the direction of the Postmaster General, to issue, or to cause to be issued, by any of his assistants or clerks in charge of branch post offices or stations, postal money orders, payable at his own or at any other money-order office, or at any branch post office or station of his own, or of any other money-order office, as the remitters thereof may direct; and the postmaster and his sureties shall, in every case, be held accountable upon his official bond for all moneys received by him or his designated assistants or clerks in charge of stations, from the issue of money orders, and for all moneys which may come into his or their hands, or be placed in his or their custody by reason of the transaction by them of money-order business.

While this section relates only to money-order business in branch post offices or stations, it contains a strong indication as to the proper interpretation of Section 4045. Postmasters are authorized to carry on money-order business in branch post offices or stations, but in such case the postmaster and his sureties are made liable on his official bond

for all moneys received "from the issue of money orders" or "by reason of the transaction * * * of money-order business." It would be illogical to suppose that Congress by this language intended to impose upon a postmaster greater responsibility with respect to funds received in branch post offices than with respect to funds received at the main post office directly under his control. Congress undoubtedly intended by Section 4029 merely to extend to funds received at branch post offices the same responsibility which existed by virtue of Sections 4045 and 3846 with respect to main post offices. Clearly, therefore, Congress regarded Section 4045 as applicable to all moneys received at a main post office by reason of the transaction of money-order business.

A similar indication as to the meaning of Section 4045 is furnished by Section 4044 of the Revised Statutes. That section, as amended, provides:

> It shall be the duty of postmasters at post offices authorized to issue money orders to render to the Auditor of the Treasury for the Post Office Department monthly, semimonthly, weekly, semiweekly, or daily accounts of all money orders issued and paid, of all fees received for issuing them, of all transfers and payments made from money-order funds, and of all money received to be used for the payment of money orders or on account of money-order business.

It requiring accounts of "all money received * * * on account of money-order business" Congress must have thought that all such money was public money under Section 4045 for which postmasters were responsible under Section 3846. There could be no reason for requiring postmasters to render accounts of money which was not public money and for which they were not responsible.

(d) *The authorities*

There are apparently only two cases which have any direct bearing upon the question under consideration. In *Foster* v. *United States* (C. C. A., 5th Circuit), 256 Fed. 207, the defendant, at the time of the alleged commission of the offenses charged in the indictment, was postmaster at Shongaloo, Louisiana. He was convicted on two counts of the indictment which charged him with failing or refusing to remit to or deposit in the Treasury of the United States, or in a designated depositary, money order funds of the Shongaloo Post Office, and thereby embezzling them, and with having failed to account for or turn over to the proper officer or agent money order funds, when required so to do by the law or the regulations of the Post Office Department, or upon demand or order of the Postmaster General, either directly or through a duly authorized officer or agent, and having thereby embezzled them. In the course of an opinion affirming the judgment of conviction the Circuit Court of Appeals said (p. 211):

> The defendant also contends that the money received by him on C. O. D. parcel-post packages, to be remitted to the sender, did not constitute money-order funds, and could not be considered by the jury in determining the shortage. The evidence showed that the post-office regulations provided that the C. O. D. tags should be treated as applications for money orders, and that the delivering postmaster should fill out a money order on the sending post office to remit the amount collected from the addressee. The department treated such moneys as money-order funds, and they clearly might be properly so treated, and this fixed their character as such. Again, the funds of this character were but a small part of the conceded balance due from defendant to the government, and not explained by him, and the ruling could have made no difference to the defendant on whom no fine was imposed.

In *United States* v. *Mann* (D. C., S. D. Georgia), 160 Fed. 552, it was held that money received and receipted for by a rural letter carrier from patrons of his route, to be used in the purchase and forwarding of money orders, while in the possession of such carrier and before surrender at the post office, did not constitute money-order funds for the embezzlement of which the carrier could be prosecuted under Section 4046 of the Revised Statutes. On pages 554–555 Judge Speer said:

> The question must be determined upon the inquiry whether the sums handed the rural letter carrier by the person who lived

along his route for the purchase of money orders can be regarded in any sense as a part of the "money-order funds" which Congress has sought to protect by sections 4045 and 4046 of the Revised Statutes, which must be construed together. Are they money received for the "sale of money orders"? We think not, for at the time of the transaction there has been no such sale. The intention of Congress here obviously related to the method of handling money-order funds at the time its early legislation on the subject gave this definition. At that time the term "sale of money orders" related to the executed transactions, when the money-order clerk at the post office, at his appropriate place in the post-office building, had sold the money order to an applicant and received the price, which then became part of the "money-order funds." Had Congress intended to enlarge its exact and copious definition of the "money-order funds," so as to include the executory transaction between the rural carrier and his patron, it would have enlarged the definition in language apt and specific for such purpose.

We think it is not at all clear that Judge Speer's decision would have been the same if the applications for money orders and funds to pay for the same had actually been delivered at the post office to the person authorized to receive them. If the opinion is to be construed as covering such a case, we believe that, to that extent at least, it is unsound.

II

SMITH RECEIVED THE MONEY IN QUESTION AS A PUBLIC OFFICER, ACTING IN THE LINE OF HIS DUTY, AND THE MONEY BELONGED TO THE UNITED STATES AND WAS PUBLIC MONEY IRRESPECTIVE OF WHETHER IT WAS "MONEY ORDER FUNDS" UNDER SECTION 4045 OF THE REVISED STATUTES

The appellants contend that Smith was the agent of the addressees of the C. O. D. packages for the purchase of money orders, and that the money paid to him was in transit until the money orders were actually purchased. On pages 19–20 of their brief they say:

> A commodity shipped by C. O. D. Parcel Post is in transit from time of receipt from shipper to time of delivery to consignee. The money collected by the carrier or delivering clerk, on delivery of packages is in transit from time it is received until it is paid on the purchase of a money order.

But commodities shipped by parcel post are, of course, intended to be transmitted, while there is no intention that money paid into a post office for a money order shall be transmitted in specie. When an applicant for a money order pays the money therefor to an authorized clerk at a post office, he does not intend to retain any interest in the particular cash paid in, and certainly does not intend to make the clerk his agent. The clerk receives the money as a public officer, acting in the line of his duty, and the money belongs to the United States and is public money.

Moreover, the regulations of the Post Office Department negative the appellants' contention. Section 489 of the *Postal Laws and Regulations* (1913) contains, among others, the following subdivisions:

> 5. The C. O. D. tag shall show the amount due the sender, the money-order fee necessary to make the remittance, and the total amount to be collected. It shall be securely attached to the parcel, which shall be numbered to correspond with the tag, stamped C. O. D., and the charges to be collected plainly written thereon. The parcel shall be treated as ordinary mail until it reaches the office of address, where, on payment of all charges, it shall be delivered to the addressee or, unless otherwise directed by the addressee, to the person, firm, or corporation in whose care it is addressed, or to any responsible person to whom the addressee's ordinary mail is customarily delivered. A receipt for the parcel shall be obtained on the tag attached thereto.
>
> * * * * *
>
> 8. The receipted tag shall be considered as the addressee's application for a money order for the amount due the sender. A money order shall then be issued, stamped C. O. D., and mailed to the sender in a penalty envelope by the postmaster, who shall enter on the tag the number of the money order, the amount and date of issue, and file it with other money-order applications. No return receipt shall be furnished

the sender, as the money order serves that purpose.

9. The addressee shall not be permitted to examine the contents of a C. O. D. parcel until it has been receipted for and all charges paid. A parcel may be refused when it is tendered for delivery, but after delivery has been effected it can not be returned on account of dissatisfaction with the contents or the amount collected.

It will be noted that after the addressee of a C. O. D. package has paid the charges, received the package, and signed the tag which is to be considered his application for a money order, he can not return the package or reclaim his money. This is entirely inconsistent with the theory that the clerk who receives the money is the addressee's agent.

A contention very similar to that now urged by the appellants was made in *Smith* v. *United States,* 170 U. S. 372. In that case it was held that when an entryman goes to the public land office for the purpose of obtaining public land, and is told by the receiver that his proofs can not be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer of the United States, and not to him as the agent of the entryman, and the payment is to be regarded as one made to the Government and as public money, within the meaning of the law and of any bond given for the faithful discharge of the duties of

his office by the receiver, and for his honestly accounting for all public funds and property coming into his hands.

On pages 378–380 the Court said:

> * * * When the entryman goes to the public land office for the purpose of obtaining the land he desires, and is told that his proofs can not be filed or accepted unless and until he pays the purchase price of the land, which he thereupon does, he makes such payment to the receiver as a public officer, acting in the line of his duty, and it is safe to say that the entryman is without any thought or intention of paying the money to such receiver as his own private agent, to be kept by that agent in trust until the proofs are satisfactory, and to be then paid by him to the Government; nor are the circumstances of that nature which would lead to the belief that in making such payment the entryman is in fact trusting to the good faith and integrity of the receiver as his agent and that he does not regard himself as dealing with a public officer of the Government. The law accords with the fact. How can it be said that the money which he pays does not become public money upon such payment, when he pays it pursuant to law as the purchase price of land which he desires to buy and the money is exacted from him by the Government before any final action is taken upon his application? What difference does it make that the Government comes under an obligation to repay the money to the man in

case the proofs are not finally accepted? The money is none the less public money when paid to this public official pursuant to law and under the direction and by reason of the regulations of the Land Office. See *King* v. *United States,* 99 U. S. 229.

As the party taking the money is a public officer, and as he exacts the payment, and such exaction is in pursuance of a regulation of the General Land Office, and is consistent with and authorized by law, it seems to us that the money thus paid is received by the receiver as public money and in his official capacity, and he is neither in law nor in fact the agent of the entryman. If the proofs are unsatisfactory and the money is returned, it is returned by the receiver as a public officer and as the agent of the Government, and the money is returned by the Government through its agent.

The custom of the Land Office at the time in question not to have such money appear in the accounts of the receiver with the Government until after the proofs had been passed upon by both register and receiver and a final receipt given, does not affect the character of the money so paid. The receiver receives the money as a public officer pursuant to the provisions of law. While in the hands of the receiver it remains public money, received by him by virtue of his office, and the money belongs to the Government as between it and the receiver, although it may be under obligations to return the same to the entryman in case his proofs

were rejected. When the Government authorized the return of the money by the receiver, in making such return he acted as its agent and not as the agent of the entryman, and the payment was not by the receiver in his personal capacity.

The Court further said, on page 381:

> Public money in the sense of the law, and as used in this bond, is money which legally comes to the receiver by virtue of his office and as a public officer and while carrying out the duties of his office, and he can not be permitted to say that it was not public money when so received. Being public money, he is bound to account.

In 20 Op. A. G. 24, Mr. Chief Justice Taft, then Solicitor General, held that a special disbursing agent of a Board of Town-site Trustees of Oklahoma Territory, who deposited moneys received by him as such agent in two banks that suspended payment, with his sureties, was liable for any loss that might arise from the failure of these banks, the banks not being lawful depositaries of public money. On page 25 it was said:

> A preliminary objection is made to his liability for the loss of a part of the sums on the ground that it was collected from assessments made and never in the treasury. It was, however, money properly paid into his hands as a special disbursing agent, and was public money, while there, because the United States was responsible for its proper dispo-

sition, whatever that might ultimately be. His bond expressly bound him to account for all public moneys coming into his hands.

The *United States Official Postal Guide,* July, 1921, contains the following provision (page 108, paragraph 68):

> At first and second class offices if practicable, an employee not engaged in the money-order division must be designated by the postmasters to have charge of the assignment of C. O. D. parcels to employees for both carrier and desk delivery. Such employee must obtain the signature of the carriers on the delivering employee's coupons provided for that purpose. These coupons will be surrendered to the carriers upon return of the amounts collected, together with the receipted tags therefor, or the returned parcels. The employees making delivery must turn over to the clerk in charge the receipted tags and sums collected, together with the undelivered parcels, daily. The assigning clerk will receipt on the back of the delivery employee's coupon to show the amount delivered to him or that the parcel was turned back without delivery. If collection is made, the delivery employee's coupon should be receipted in the following manner, viz, "JCL $14.64"; if for a parcel returned undeliverable, viz, "JCL Returned." Those parcels which have not been delivered will be reissued on the succeeding day, if delivery is assured. The coupons for undelivered parcels should be retained by the carriers until

parcels are again taken out for delivery, and will be given to the employee assigning such parcels when they are again turned over to the carriers, and finally surrendered to the carriers when delivery is effected or they are relieved of the custody of the parcels. These coupons should be filed in numerical order by the delivering employees and retained for a period of one year. The clerk in charge must deliver daily to the money-order division the amounts received by him, together with the receipted tags, and should take a receipt in bulk on Form 3815, showing the total sum turned over for the issuance of money orders, and the total number of parcels represented thereby. When the money orders are issued, which must be the same day if practicable, the receipts should be detached therefrom and given to the clerk in charge as evidence that remittances have actually been made for all C. O. D. parcels delivered. He must see that receipts are thus furnished him corresponding in number and amount to the collections turned over by him. Such receipts must be filed in regular order, according to serial numbers and dates, and preserved for three years.

Smith was an employee not engaged in the money-order division designated in accordance with this provision. But the fact that the Post Office Department, for its own convenience, provided that the duties in connection with collections on C. O. D. packages and sending of money orders to the shippers of such packages should be divided among two

or more employees, instead of being performed by one, does not make any of such employees any less the agent of the Post Office Department or any more the agent of the addressees of the packages. Smith was under the supervision and control of the Postmaster to the same extent that employees in the money-order division were, and money which came into Smith's hands was in the constructive possession of the Postmaster to the same extent as if it had been paid to the money-order division.

III

THE FACT THAT THE GOVERNMENT INDEMNIFIES SHIPPERS AGAINST LOSS IS IMMATERIAL, AS IT IS IN NO WAY INCONSISTENT WITH AN INTENTION TO HOLD POSTMASTERS AND THEIR SURETIES ON THEIR OFFICIAL BONDS

The final contention of the appellants is that the fact that the Government indemnifies shippers against loss is evidence that the money embezzled by Smith was not public funds.

Section 8 of the Act of August 24, 1912, c. 389, 37 Stat. 539, 558, contains the following provision:

> The Postmaster General shall make provision by regulation for the indemnification of shippers, for shipment injured or lost, by insurance or otherwise, and, when desired, for the collection on delivery of the postage and price of the article shipped, fixing such charges as may be necessary to pay the cost of such additional services.

The *United States Postal Guide,* July, 1921, pages 100–101, Paragraph 2, contains the following:

> Fourth-class or domestic parcel post mail * * * may be sent C. O. D.; that is, the price of the article and the charges thereon (including, if desired, the postage and fee prepaid) will be collected from the addressee, not to exceed $50, on payment of a fee of 10 cents (in stamps affixed to the parcel) in addition to postage; and not to exceed $100 on payment of a fee of 25 cents. Such parcels are insured for not exceeding $50 and $100, respectively, according to whether a 10 or 25 cent fee was paid, against the non-receipt of returns therefor if delivered and collection is effected; and against loss, rifling, or damage in an amount equivalent to the actual value.

The appellants' argument seems to be two-fold: first, that because the Government collects a charge or premium presumably sufficient to indemnify it against loss, it can not intend to hold Postmasters and their sureties responsible for such loss; and, second, that if the money embezzled was public money, the obligation of the Government to issue money orders to shippers accrued when it was received, and no insurance was necessary, and therefore the fact that the law and the regulations provided for indemnification of shippers indicates that the money was not public money.

In answer to both branches of the appellants' argument, it may be said that the appellants do not

question, and could not question, that collections on C. O. D. packages become public moneys when money orders are actually issued therefor. Yet the so-called insurance provided for by the regulations covers this portion of the transaction as well as all others; it protects the shipper throughout the whole transaction, from the time the package is shipped until the time he receives the money order representing payment therefor. Under these circumstances no inference that the collections on C. O. D. packages are not public moneys until money orders are actually issued can be drawn from the fact that the "insurance" covers loss during this portion of the transaction as well as during any other portion of the transaction.

As to the first branch of the appellants' argument, there is nothing inconsistent, or even unusual, in an insurer protecting himself in so far as possible against the consequences of a loss, and indemnifying himself by recovery from the person or persons responsible for the loss, even though he has received a premium for the insurance. Moreover, the appellants' responsibility is in no way dependent upon loss to the United States. They are responsible under the terms of the bond for the public money which has been lost, regardless of whether or not such loss fell upon the United States or upon the shippers of the packages. Whether or not the shippers were able to recover from the United States, through insurance or

otherwise, is a matter with which the appellants have no concern. *Smythe* v. *United States,* 188 U. S. 156, was an action upon the official bond of a superintendent of a mint for $25,000 in treasury notes which had come into his hands and had been destroyed without negligence on his part. It was contended that the Government had not suffered any substantial damage by the destruction of its own obligations, and that in no event was it entitled to a judgment for more than nominal damages, or at most for only such amount in damages as would meet the cost of reprinting new treasury notes to take the place of those destroyed by fire. The Court said (pages 173–174):

> * * * Such a proposition can not be entertained for a moment. The plea of *non damnificatus* has no place in such case as this. The treasury notes that came to the hands of Superintendent Smythe was money belonging to the United States and could be used, at its pleasure, in the business of the Government. By their destruction, if they were destroyed by fire in the manner claimed, the United States was deprived of so much money, and the condition of the officer's bond that he would safely keep the moneys in his custody and turn them over to the Government, when required, can not be met by the suggestion that the Government, if it so elects, can replace the notes destroyed by other notes and thus make itself whole, less the cost of printing new notes. It is for the

> Government, guided by the legislation of Congress, to determine when it shall or may issue new treasury notes, and it can not be compelled to issue them in order to reimburse itself for the loss of those in the hands of an officer who was required, by the terms of his bond, to deliver them to the Treasury, but did not do so. The Government can stand upon the terms of its special contract with the Superintendent, and insist that he has not discharged his duties by safely keeping the moneys that came to his hands, and which he undertook to pay over, when required.

It has been uniformly held that the United States may recover on the bond of a letter carrier for the loss of registered letters, regardless of whether the United States is liable to the owners of the letters.

National Surety Co. v. *United States,* 129 Fed. 70;

American Surety Co. v. *United States,* 133 Fed. 1019;

United States v. *American Surety Co.,* 155 Fed. 941;

United States v. *American Surety Co.,* 161 Fed. 149, reversed on other grounds, 163 Fed. 228;

Gibson v. *United States,* 208 Fed. 534;

United States Fidelity and Guaranty Co. v. *United States,* 229 Fed. 397;

United States Fidelity and Guaranty Co. v. *United States,* 246 Fed. 433, affirmed 247 Fed. 16.

It is true that the judgment in this case might more properly have been for $10,151.91, the total amount embezzled by Smith, with interest, instead of for only $9,257.11, with interest, such $9,257.11 representing $9,173.45 paid as indemnity to shippers and $83.66 due the Government as money-order fees. But if the judgment was erroneous in this respect, the error is not one of which the appellants can complain.

The second branch of the appellants' argument is that if the money embezzled was public money, the obligation of the Government to issue money orders to shippers accrued when it was received, and no insurance was necessary, and therefore the fact that the regulations provide for insurance indicates that the money was not public money. It may be admitted that if the money embezzled was public money, the obligation of the Government to issue money orders to shippers accrued when the money was received. But, as pointed out above, the so-called insurance provided for in the regulations covers the whole transaction from the time the package is shipped to the time the money order in payment therefor is received by the shipper. In the absence of insurance the Government probably would not be liable for loss, rifling, or damage, prior to delivery of the package, and to this extent the so-called insurance is real insurance, creating an obligation which would not otherwise exist. As to losses occurring after collections have been made on C. O. D. packages, the provision of the

regulations treating these as also covered by insurance may well be regarded as no more than a specific recognition of an obligation that would exist in any event. The fact that the regulations use the word "insurance" in this connection certainly is not sufficient to overcome all of the other evidence that money collected on C. O. D. packages is public money.

Moreover, the statute (Section 8 of the Act of August 24, 1912, *supra*) appears to recognize the distinction between losses occurring prior to delivery of packages and those occurring after collections have been made, and does not provide for insurance with respect to the latter. The Postmaster General is to make provision for two things: first, " for the indemnification of shippers, for shipment injured or lost, by insurance or otherwise "; and secondly, "for the collection on delivery of the postage and price of the article shipped." Congress, therefore, evidently did not think insurance was necessary to protect the shipper after the collection had been made.

CONCLUSION

The judgment of the Circuit Court of Appeals should be affirmed.

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JANUARY, 1927.

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